Birth and decay of the Chilean Constitutional Tribunal (1970–1973)
The irony of a wrong electoral prediction

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Abstract

Scholars debate about why constitution-makers create constitutional courts, and what the conditions are for making these tribunals politically relevant. This article examines how the understudied Chilean 1970–1973 Constitutional Tribunal has contributed to this discussion. That Tribunal was created in 1970, through an error made by constitution-amenders who believed that someone else was going to be elected president. Although the Tribunal generally benefited the unexpectedly elected president (Allende), it finally lost its relevance because of its refusal to alleviate a significant political conflict. Judicial review theories based on rights and political competition are not applicable to the Chilean case. The separation of powers theory, which claims that constitutional courts develop because of their function in solving inter-branch disputes, partly explains the creation of the Tribunal. However, the Chilean example suggests that that theory does not apply in highly controversial contexts.

1. Introduction

Why do constitution-makers institutionalize judicial review, and what explains its success and failures? Success could mean many things. In the terms of this paper, it means only that the court can achieve the goals set by the constitution-makers, that

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it maintains some political relevance, and is capable of ruling on a controversial decision without undermining its influence. Scholars have answered both questions developing rival theories. This paper contributes to this debate by analyzing the Chilean 1971–1973 Constitutional Tribunal (CT) experience.

It is common to find courts that were created to advance specific institutional aims but develop unexpected roles, such as the French Conseil Constitutionnel experience shows.[1] A lack of symmetry between the desires of the constitution-makers and what transpires is not infrequent. The story of the Chilean CT is different. Unusually, the Tribunal provides an example of a court that seizes less power and opportunity during its tenure than expected by the constitution-makers.

The drafters of the 1970 Chilean Constitution wanted the CT to benefit the person they believed was going to be elected president, namely the right-wing candidate Jorge Alessandri. Instead, the left-wing candidate, Salvador Allende, was elected. From the perspective of those amending the Constitution, then, the CT generally benefited the *wrong* president to the disadvantage of the Congress which was controlled by the opposition. The CT was dissolved shortly after the 1973 military coup. Although the CT normally operated according to its institutional design and the justices voted as expected, the Tribunal lost relevance when it refused to decide a critical case that was threatening to undermine the whole constitutional structure.

It is, of course, true that the deeply contentious political environment in Chile all but ensured the eventual collapse of the CT. Nevertheless, the Tribunal exhibited some features of successful judicial review. This limited success is especially noteworthy given that few of the CT institutional features insulated the justices from political pressure.

The history of the Constitutional Tribunal provides an opportunity to refine judicial review theories. This article suggests that the CT case partly fits in with the theory that explains the rise of judicial review by a separation of powers structure that promotes inter-branch competition. However, this theory does not account for the decline of the CT's influence. The Chilean experience also shows that the existence of political conflict may not always stimulate the rise of judicial review. Instead, when political conflict threatens to come out the boundaries of the constitutional framework, the conflict may undermine constitutional courts.

Section 2 addresses the theoretical debate. Section 3 then describes the institutional context and identifies a scholarly gap in studying the 1971–1973 Constitutional Tribunal. Next, Section 4 explores the CT's origin and design, identifying its institutional purpose. Section 5 analyzes the justices' background and their appointment stories. Section 6 addresses the cases and the justices' voting behavior. In Section 7, the article goes on to evaluate the Tribunal's performance per its institutional goals and, in Section 8, discusses the application of judicial review theories.

[1] Alec Stone Sweet, The Birth of Judicial Politics in France. The Constitutional Council in Comparative Perspective (1992).

2. Theoretical review

Why would self-interested politicians create institutions of judicial review? Some theories connect the birth of constitutional courts with the denunciation of rights violations committed by past authoritarian regimes,[2] as well as a desire for a "new beginning" intended to put the authoritarian past behind[3] in an effort to prevent further abuses.[4] Others have connected the rise of judicial review with the legal tradition. Civil-law countries seem to be more likely to create centralized judicial review institutions,[5] and tend to reject the decentralized American model.[6] There is additional evidence which suggests that academic elites are capable of successfully promoting the creation of judicial review institutions,[7] especially when politicians have insufficient incentives to care, and instead delegate the issue to scholars.[8]

Once constitutional courts have been created, what reasons could self-interested politicians have for tolerating them? A court's success may depend on the existence of the separation of powers which allows for inter-branch competition;[9] this explanation may, however, fail under certain conditions.[10] The separation of powers may explain judicial review in some scenarios, but is not a necessary condition.[11] Identifying the right variables may be "beyond our grasp."[12] An alternative theory claims that what makes courts relevant is decisions which advance their influence through cases involving moral disagreement about rights.[13] Another set of theories examines the utility of judicial review institutions to politicians; they argue, for example, that judicial independence could be useful to enforcing deals between incumbent legislators and interest groups.[14]

[2] John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 Tex. Law Rev. 1671, 1674 (2004).

[3] Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. Law Rev. 771 (1997).

[4] Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice,"* 35 Cathol. Univ. Law Rev. 1, 6 (1985).

[5] Mark Tushnet, Advanced Introduction to Comparative Constitutional Law 51 (2014).

[6] Miguel Schor, *Judicial Review and American Constitutional Exceptionalism*, 46 Osgoode Hall Law J. 535 (2008); Alec Stone Sweet, *Why Europe Rejected American Judicial Review. And Why It May Not Matter*, 101 Mich. Law Rev. 2744 (2003).

[7] Lech Garlicki, *Constitutional Court of Poland: 1982–2009*, *in* The Political Origins of Constitutional Courts 13–39, 15 (Pasquale Pasquino & Francesca Billi eds., 2009).

[8] Cristina Parau, *The Dormancy of Parliaments: The Invisible Cause of Judiciary Empowerment in Central and Eastern Europe*, 49 Representation 267 (2013).

[9] Martin Shapiro, *The Success of Judicial Review*, *in* Constitutional Dialogues in Comparative Perspective 193 (Sally Kenney, William Reisinger, & John Reitz eds., 1999); Martin Shapiro, *Judicial Review in Developed Democracies*, 10 Democr. Judic. 7 (2003).

[10] Martin Shapiro, *The Mighty Problem Continues*, *in* Consequential Courts. Judicial Roles in Global Perspective 380, 382 (Diana Kapiszewski, Gordon Silverstein, & Robert Kagan eds., 2013).

[11] *Id.* at 395.

[12] *Id.* at 397.

[13] Wojciech Sadurski, *Judicial Review in Central and Eastern Europe: Rationales or Rationalizations?*, 42 Isr. Law Rev. 500 (2009); Wojciech Sadurski, Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (2008).

[14] William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. Law Econ. 875 (1975).

Some scholars claim that what drives judicial review is political competition. Ramseyer, for example, argues that judicial review institutions remain when competing politicians expect future elections continue indefinitely.[15] Similarly, Stephenson suggests that independent judicial review institutions will be likely to exist when opposite competing politicians enforce mutual restraint.[16] Political fragmentation and electoral competition further gives judges room to expand their power, because judges have more opportunities to arbiter among different political factions without risking adverse reactions by hegemonic political organizations. These types of reflection seem popular in the economic analysis of constitutions.[17]

Possibly the most popular among the political competition explanations is the *insurance theory*, which claims that constitutional courts are created to secure the existence and influence of constitution-makers who believe they may lose future elections.[18] Since constitution-makers are uncertain about the result of future elections, they create constitutional courts as an *insurance* in case they lose elections. That insurance will prevent the winners from undermining the political rights of the electoral losers. Other scholars developed similar explanations.[19]

While the insurance theory seems plausible for certain countries,[20] some case studies show that it is not universally applicable.[21] There is some comparative quantitative research discussing this issue,[22] but that kind of investigation has limitations.[23] Quantitative empirical studies seem more appropriate for understanding local conditions than for contributing to comparative constitutional studies.[24] Breaking down the story of a specific country into a single dataset may lead to erroneous categoriza- tions due to the difficulties involved in distinguishing among various contexts.

For example, a quantitative study focusing on Latin America supports the claim that judicial review institutions are likely to be created when rival political organizations

[15] J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. Leg. Stud. 721 (1994).

[16] Matthew Stephenson, *"When the Devil Turns . . .": The Political Foundations of Independent Judicial Review*, 32 J. Leg. Stud. 59 (2003).

[17] Robert D. Cooter, The Strategic Constitution 195–198 (2000); Dennis Mueller, Constitutional Democracy 279–296 (1996).

[18] Tom Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 3 Theor. Inq. L. 49 (2002); Tom Ginsburg, Judicial Review in New Democracies. Constitutional Courts in Asian Cases (2003).

[19] Pasquale Pasquino, *Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy*, 11 Ratio Juris 38, 47 (1998); Donald Horowitz, *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, 49 William Mary Law Rev. 1213, 1228 (2008); Julio Ríos-Figueroa & Andrea Pozas-Loyo, *Enacting Constitutionalism: The Origins of Independent Judicial Institutions in Latin America*, 42 Comp. Polit. 293 (2010).

[20] Ginsburg, *supra* note 18; Jodi Finkel, Judicial Reform as Political Insurance. Argentina, Peru, and Mexico in the 1990s (2008).

[21] The Political Origins of Constitutional Courts. Italy, Germany, France, Poland, Canada, United kingdom (Pasquale Pasquino & Francesca Billi eds., 2009).

[22] Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?*, 30 J. L. Econ. Org. 587 (2013).

[23] Tushnet, *supra* note 5, at 6–7.

[24] Nuno Garoupa, *Empirical Legal Studies and Constitutional Courts*, LE10-015 Ill. L. Econ. Res. Pap. Ser. U. Ill. Coll. Law 1, 5 (2010).

with veto power control the constitution-making process.[25] However, the Chilean Constitutional Tribunal experience suggests that constitution drafters created the CT because the legislative majority was trying to protect the powers of the president they wanted to be elected, in the absence of an agreement among rival coalitions with veto power.

3. The 1970 Chilean institutional context in a nutshell

The 1925 Constitution established a presidential regime. Political power was distributed between the president and the Congress, while the Supreme Court was politically irrelevant,[26] lacked significant judicial review powers, and had been developing a deferential jurisprudence. Chilean constitutionalism was described as "legality without courts"[27] because the main legal developments did not involve courts, and an independent administrative agency called *Contraloría* controlled the legality of the actions of the executive branch. However, when Allende was elected president, the courts were repeatedly forced to take sides, and they defended positions that favored the opposition.[28]

The President was elected by direct vote and served for a non-renewable six-year term. The President had significant legislative powers (such as initiating and vetoing legislation). If no presidential candidate received more than half of the votes (a typical situation in the Chilean multiparty system), the Congress was required to decide the election between the two candidates who had received the most votes. Traditionally, the Congress favored the candidate who had secured the most votes (i.e., the 1946, 1952, and 1958 elections). Legislators (organized in a bicameral Congress) were partially elected every four years through a proportional electoral system. They could impeach some officers appointed by the President by a simple majority and the President by a two-thirds majority.

Three relevant rival political coalitions existed. This frequently resulted in the President lacking control over Congress, producing *Minority presidentialism*. Under minority presidentialism, the President must work with opposing parties to approve legislation.

Constitutional reform required a majority vote in both chambers in order to be approved. Since the vote count included absent legislators, the required majority was a qualified majority. Also, the amendment procedure required the approval of

[25] Ríos-Figueroa & Pozas-Loyo, *supra* note 19.

[26] Raúl Bertelsen, Control Constitucional de la Ley (1969); 2 Francisco Zúñiga, Elementos de Jurisdicción Constitucional (2002); Gastón Gómez, *La Jurisdicción Constitucional: Funcionamiento de la Acción o Recurso de Inaplicabilidad, Crónica de un Fracaso*, 3 Foro Const. Iberoam. (2003).

[27] Julio Faúndez, *Chilean Constitutionalism Before Allende: Legality Without Courts*, 29 Bull. Lat. Am. Res. 34 (2010).

[28] Luis Maira, *Estrategia y Táctica de la Contrarrevolución*, *in* Chile 1970–1973. Lecciones de una Experiencia 243, 254 (Federico Gil, Ricardo Lagos, & Henry Landsberger eds., 1977); Arturo Valenzuela, The Breakdown of Democratic Regimes. Chile 81 (Juan Linz & Alfred Stepan eds., 1978); Lisa Hilbink, Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile (2007).

the *Congreso Pleno,* or the combined House and Senate. The president could veto the reform, but the Congress was allowed to insist, forcing the president to approve the reform or to call for a plebiscite.

Scholars considered the Chilean democracy to be "a model of democratic governance,"[29] and elections were competitive. The executive branch frequently alternated among presidents with diverse platforms. After the Radical Party administration (*Partido Radical*—a centrist liberal party that shifted to the left and joined the Allende coalition in the late 1960s) had ended (1938–1952), Presidents Carlos Ibáñez del Campo (1952–1958), Jorge Alessandri (1958–1964), Eduardo Frei Montalva (1964–1970), and Salvador Allende (1970–1973), all ruled with the support of diverse competing political organizations.

At the end of his term, President Frei Montalva (a centrist Christian Democrat President) promoted the approval of the 1970 constitutional reform (Law no. 17,284), which, among others, created the CT which started to operate under the administration of the *Unidad Popular* (UP, the left-wing party coalition supporting President Allende). Frei belonged to a centrist party that advocated for conservative values, and a strong state—the "communitarian socialism" (the *DeMocracia Cristiana*, or PDC).[30] Allende was the leader of a left-wing coalition and advocated for the "Chilean way to socialism," intended to reconcile Marxism and democracy. Thus, instead of seeking a revolution, Allende tried to implement socialism by winning elections and transforming institutions using constitutional means. Allende won the election against Alessandri (right-wing) and Radomiro Tomic (PDC), who obtained 35.27 percent and 28.11 percent, respectively.

The election was decided by Congress because Allende had received only 36.61 percent the votes. The legislators from the right-wing *Partido Nacional* (PN) supported the Alessandri nomination, those from the UP stood behind Allende, and PDC members legislators were undecided. Alessandri promised the PDC legislators that, if elected, he was going to resign and call for new elections, giving former President Frei the chance to run again.[31] Although Alessandri's offer was appealing to PDC legislators, they preferred to vote for Allende, honoring the tradition by establishing the candidate with a plurality of votes as president. In exchange, Allende agreed to approve a constitutional modification securing particular rights. Allende was elected by a 153/35 majority and, as a minority president, faced important legitimacy issues.[32]

This was a turbulent time. Several events, such as the murder of General René Schneider (who headed the Armed Forces and had promised military neutrality for Allende's government),[33] showed that violence was growing. The US President Richard Nixon and the Central Intelligence Agency (CIA) intervened in the country

[29] Faúndez, *supra* note 27, at 34.

[30] Paul Sigmund, The Overthrow of Allende and the Politics of Chile 1964–1976, at 17 (1977).

[31] *Id.* at 111; Luis Corvalán, El Gobierno de Salvador Allende 114 (2003).

[32] Jorge Tapia, *El Dificil Camino de Transición al Socialismo. El Caso Chileno, en una Perspectiva Histórica*, *in* Chile 1970–1973, *supra* note 28, 33, at 43.

[33] Radomiro Tomic, *La Democracia Cristiana y el Gobierno*, *in* Chile 1970–1973, *supra* note 28, 215, at 224.

on multiple occasions, opposing Allende's election and government.[34] In the mean- time, Allende strengthened the country's friendship with communist states, and vio- lent left-wing groups were pulling the UP's agenda onto a more radical path.

Allende did not control key institutions such as the *Contraloría* or the Congress. In the beginning, UP supporters sought agreements with the PDC, especially for helping to approve the socialist economic agenda,[35] but the PDC was not an ally. After the assassination of one of the PDC leaders by a left-wing organization,[36] the PDC became hostile to Allende's legislative plans. The opposition controlled the Congress throughout Allende's term, and had the required majority to impeach Allende's senior collaborators. Against this background, intense political conflict and legislative gridlock were expected.

Lacking majority in Congress, Allende implemented his agenda by exacerbating the presidential regulatory powers,[37] using the *resquicios legales* (legal loopholes),[38] and relying on "the prevailing high levels of political mobilization,"[39] although he was unable to moderate the internal UP divisions.[40] Among other measures, Allende extended the agrarian reform, redistributed lands, expropriated industries, and nationalized copper. There were also aspirations to redrafting the Constitution,[41] replacing the Congress with a Popular Assembly,[42] and creating a single–party system.[43]

In an effort to end growing violence, Allende appointed military officers as secretaries of state,[44] a strategy that did not stop the opposition from impeaching his senior collaborators.

The House declared that Allende's administration was outside the rule of law.[45] The Supreme Court complained that the executive branch violated judicial powers and obstructed the duty of the police to implement judicial orders.[46] The judiciary seemed to have teamed up with the opposition,[47] sparking a "severe institutional dispute."[48] The conflict ended with a military coup, putting an end to the socialist experiment and installing a dictatorship.

[34] *Id.* at 240–243; Sigmund, *supra* note 30, at 103–105.

[35] Corvalán, *supra* note 31, at 103–104.

[36] *Id.* at 190–193.

[37] Sigmund, *supra* note 30, at 133–134.

[38] Although he rejected the language of the "legal loophole," reputed professor of law Eduardo Novoa, appointed by Allende as attorney general, was the architect of Allende's legal strategy, which he explained years later: Eduardo Novoa, ¿Vía Legal Hacia el Socialismo? El Caso de Chile 1970–1973 (1978); Eduardo Novoa, El Derecho como Obstáculo al Cambio Social (16th ed. 2007).

[39] Julio Faúndez, Democratization, Development, and Legality. Chile 1831–1973, at 174 (2007).

[40] Tapia, *supra* note 32, at 52–53.

[41] Corvalán, *supra* note 31, at 39–63.

[42] Tapia, *supra* note 32, at 59.

[43] *Id.* at 60.

[44] Sergio Bitar, *Interacción entre Política y Economía*, *in* Chile 1970–1973, *supra* note 28, 116, at 123.

[45] *Acuerdo de la Cámara de Diputados*, Aug. 23, 1973.

[46] Renato Cristi & Pablo Ruiz-Tagle, La República en Chile. Teoría y Práctica del Constitucionalismo Republicano 127 (2006).

[47] Hilbink, *supra* note 28, at 74.

[48] Roberto Gargarella, Latin American Constitutionalism 1810–2010. The Engine Room of the Constitution 128 (2013).

Most scholars studying the recent Chilean legal-political history have not paid much attention to the CT. This gap in scholarship is surprising, since the Constitutional Tribunal was the first Kelsenian court established in Chile and one of the oldest of this type in Latin America,[49] and its experience influenced the design of other courts.[50]

The first academic paper on the Constitutional Tribunal, written by Alejandro Silva B., a scholar who had previously advocated the creation of the Tribunal,[51] describes the CT's features and discusses some of its key decisions.[52] In another early work, Guillermo Piedrabuena systematizes the legislative history of the 1970 reform,[53] noting that some parliamentary debates were never recorded.[54] Enrique Silva C.'s study is the only one to address the CT's doctrines and argues that the CT was an impartial (rather than polarized) court of law.[55] Since Silva C. was a CT justice appointed by Allende, a Radical Party member (the Radical Party was part of the UP coalition), and his opinions meshed well with the UP agenda,[56] his work is likely to be biased.

The rest of the relevant scholarship provides descriptive accounts,[57] briefly treating the CT as a secondary topic,[58] or focuses on limited doctrinal issues.[59] Complementing

[49] Among the countries that have followed a Kelsenian model in establishing their constitutional courts, the Chilean CT is, along with the Guatemalan Constitutional Court (created in 1965), one of the oldest courts in Latin America. The Peruvian Court was created in1979; the Colombian court in1991; the Ecuadorian Court in 1994; and the Bolivian Court in 1994—note that most of them were reformed afterwards. Countries that have followed other models include Argentina, Brazil, Venezuela, Costa Rica, Mexico, El Salvador, Honduras, Paraguay, Uruguay, Panama, and Nicaragua. *See* Humberto Nogueira, *Consideraciones sobre la Jurisdicción Constitucional en América y Europa*, Anu. Iberoam. Justicia Const. 243 (2000); Patricio Navia & Julio Ríos-Figueroa, *The Constitutional Adjudication Mosaic of Latin America*, 38 Comp. Polit. Stud. 189 (2005); Justin Frosini & Lucio Pregoraro, *Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?*, 3 J. Comp. Law 39 (2008).

[50] Some scholars in the late 1970s advocated creating a constitutional tribunal that would avoid the mistakes of the 1970 reform: *see* José Luis Cea, *Contribución al Estudio de una Nueva Constitución para Chile*, 4 Rev. Chil. Derecho 162, 177 (1977); Jaime Guzmán, *La Constitución Política*, 6 Rev. Chil. Derecho 53, 68 (1979). This idea was also influential in the 1980 constitution drafting commission: *see* Teodoro Ribera, *Función y Composición del Tribunal Constitucional de 1980*, 27 Cent. Estud. Públicos 77, 86–87 (1987).

[51] Alejandro Silva B., *Inconstitucionalidad de las Leyes*, *in* Nueva Sociedad, Vieja Constitución 105 (Jorge Guzmán Dinator ed., 1964).

[52] Alejandro Silva B., *El Tribunal Constitucional*, *in* Reforma Constitucional 1970, at 199 (1970).

[53] Guillermo Piedrabuena, La Reforma Constitucional (1970).

[54] *Id.* at 115.

[55] Enrique Silva C., 38 El Tribunal Constitucional de Chile (1971–1973), at 159 (2d ed. 2008) [1977].

[56] Novoa, *supra* note 39, at 48.

[57] Gustavo Lagos, *Tres Temas Centrales de la Reforma Constitucional*, *in* Reforma Constitucional 1970, *supra* note 53, 53; Carlos Andrade, Elementos de Derecho Constitucional Chileno (1971); Zúñiga, *supra* note 26, at 39–59.

[58] Tapia, *supra* note 32; Maira, *supra* note 28; Novoa, *supra* note 39; Ribera, *supra* note 51, at 86–87; Patricio Navia, *The History of Constitutional Adjudication in Chile and the State of Constitutional Adjudication in South America*, 2 Asian J. Lat. Am. Stud. 1(1999); Hilbink, *supra* note 28; Javier Couso, *Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970–2010*, 89 Tex. L. Rev. 1517 (2011); Lucas Mac-Clure, *El Tribunal Constitucional y los Derechos. La Discusión Pendiente*, *in* Frente a la Mayoría. Leyes Supramayoritarias y Tribunal Constitucional en Chile 274 (2011).

[59] Arturo Fermandois & José García, *Origen del Presidencialismo Chileno: Reforma Constitucional de 1970. Ideas Matrices e Iniciativa Legislativa Exclusiva*, 36 Rev. Chil. Derecho 281 (2009).

that literature, historical research and books authored by politicians help understand the context of the cases decided by the CT.[60]

4. The 19/0 reform

Why was the Chilean Constitution amended in 1970 to include the Constitutional Tribunal? What problems were the constitutional amenders trying to solve, and what were their political motivations?

The typical explanation advanced, based largely on the work by Silva B.,[61] suggests that the CT was designed to resolve inter-branch disputes arisen in the course of the legislative process between the president and the Congress.[62] Prior to 1970, Chile had lacked an arbiter that could mediate this type of conflict,[63] and the Supreme Court had declined to take on such a role,[64] partly because of the Supreme Court's refusal to review the constitutionality of statutes challenged on the ground of flawed legislative procedures.[65]

Scholars, arguably starting with Alejandro Silva B., had suggested establishing a constitutional tribunal.[66] Although the authorship of the idea is disputed,[67] the proposal had wide support among constitutional scholars, as showed in the debates at a conference that was held at the Universidad de Concepción in 1964.[68] Scholars of that time looked, for the most part, at the French and Italian models in their scholarly work.[69]

Chilean presidents have long complained about the problems of minority presidentialism, and some of them advocated for the creation of an arbiter that could defend the Presidential legislative powers against the Congress.[70] In 1964, President

[60] Sigmund, *supra* note 30; Faúndez, *supra* note 40; Julio Faúndez, Marxism and Democracy in Chile. From 1932 to the Fall of Allende (1988). Edgardo Boeninger, La Democracia en Chile. Lecciones Para la Gobernabilidad (1997); Corvalán, *supra* note 31.

[61] Silva B., *supra* note 52, at 201.

[62] Silva C., *supra* note 56, at 157; José Luis Cea, *La Justicia Constitucional y el Tribunal de la Constitución en Chile*, XII Rev. Derecho Valdivia 107, 112 (2001); Lautaro Ríos, *El Nuevo Tribunal Constitucional*, *in* Reforma Constitucional 627, 630 (Francisco Zúñiga ed., 2005); Couso, *supra* note 59, at 1529.

[63] Raúl Letelier, *Jueces Ordinarios y Justicia Constitucional*, 34 Rev. Chil. Derecho 539, 552 (2007); Marisol Peña, 47 Aportes del Tribunal Constitucional de Chile al Estado de Derecho y a la Democracia 58 (2011); MacClure, *supra* note 59 at 195; Dante Figueroa, *Constitutional Review in Chile Revisited: A Revolution in the Making*, 51 Duquesne Law Rev. 387, 396 (2013).

[64] Ribera, *supra* note 51 at 85–86; Edith Friedler, *Judicial Review in Chile*, 7 Southwest. J. Law Trade Am. 321, 321, 330 (2000).

[65] Teodoro Ribera, *El Tribunal Constitucional*, 11 Rev. Chil. Derecho 339, 340 (1984).

[66] Silva B., *supra* note 53, at 105–106.

[67] The authorship of the idea is disputed. It seems that Cumplido suggested the idea before Silva B. Zúñiga, *supra* note 26 at 40; Ríos, *supra* note 63, at 627–628; Enrique Navarro, 43 El Control de Constitucionalidad de las Leyes en Chile (1811–2011) 28 (2011).

[68] See a summary of the conference in *Terceras Jornadas Chilenas de Derecho Público*, 3 Revista de Derecho Público 113, at 113–114 (1965); Jorge Guzmán, *Conclusiones*, *in* Nueva Sociedad, Vieja Constitución, *supra* note 52, 238, at 242.

[69] Silva B., *supra* note 53, at 105–106.

[70] Enrique Evans, Chile, hacia una Constitución Contemporánea. Tres Reformas Constitucionales 64 (1973).

Alessandri suggested strengthening the Supreme Court's power of judicial review,[71] an idea already tossed around in the academia[72] and promoted by other politicians in the 1950s.[73] In 1965, President Frei presented a proposal of a constitutional tribunal,[74] but it was not approved. Toward the end of his term, however, Frei returned with a draft constitutional reform aimed to strengthen presidential legislative powers, including the creation of a constitutional tribunal. The reform was approved quickly with modifications, and it was published in 1970.

In addition to resolving inter-branch disputes, the Constitutional Tribunal was expected to back the president's legislative powers against the Congress,[75] thus becoming a sort of legislative "watchdog."[76] Some scholars note that the French *Conseil Constitutionnel* was used as a model.[77] The French *Conseil Constitutionnel* also operates with *ex-ante* review of legislative bills. The French *Conseil Constitutionnel* was similarly designed to be a "watchdog" of the French Parliament[78] although it later evolved into a policymaker.[79] Others claim that the CT was part of the global expansion of the judicial review,[80] a widely recognized phenomenon.[81] However, comparative accounts do not explain the political decision to create the CT, because constitution-makers looked at foreign models to solve local problems.

It is possible to argue that legal scholars were key to the creation of the Constitutional Tribunal because the constitution-makers were trying to solve a problem already addressed in the literature,[82] and because some CT features were similar to those suggested therein. However, the decision to create the CT was independent of academia.

4.1. The 19/0 reform's justification

Eduardo Frei Montalva's *Mensaje*—a formal explanation of the legislative bill addressed to the Congress—said that the purposes of the project were: to provide mechanisms to resolve political conflicts, to accelerate parliamentary procedures, and to give the president control over economic planning.[83] Among conflict resolution tools, the

[71] Sergio Carrasco & Roberto Morrison, *Estudio Comparativo Proyectos de Reforma a la Constitución de 1925 Presentados con Fecha 7 de Julio de 1964, 30 de Noviembre de 1964 y 17 de Enero de 1969*, 6 Rev. Chil. Derecho 149, 152–153 (1979).

[72] Alejandro Hales, *Inconstitucionalidad de los Actos del Parlamento*, *in* Nueva Sociedad, Vieja Constitución, *supra* note 52, 192, at 192–193.

[73] Enrique Navarro, *Notas sobre la Evolución Histórica del Control de Constitucionalidad de las Leyes en Chile*, 22 Rev. Chil. Hist. Derecho 1231, 1239 (2010); Zúñiga, *supra* note 26, at 40.

[74] Ribera, *supra* note 51, at 85; Couso, *supra* note 59, at 1528.

[75] Silva C., *supra* note 56, at 159–160; Zúñiga, *supra* note 26, at 52; Couso, *supra* note 59, at 1529.

[76] Zúñiga, *supra* note 26, at 55.

[77] Couso, *supra* note 59, at 1528; Figueroa, *supra* note 64, at 396–397; Javier Couso et al., Constitutional Law in Chile 122 (2013).

[78] Stone Sweet, *supra* note 1, at 46–50.

[79] *Id.* at 66–92.

[80] Mac-Clure, *supra* note 59, at 191.

[81] The Global Expansion of Judicial Power (C. Neal Tate & Torbjörn Vallinder eds., 1995).

[82] Ribera, *supra* note 66, at 340.

[83] *See* the "Mensaje del Presidente Frei" in Historia de la Ley N° 17.284. Modifica la Constitución Política del Estado 4–14 (1970).

bill considered holding a plebiscite authorizing the presidential power to dissolve the Congress and creating a constitutional tribunal.[84] Only the constitutional tribunal and the plebiscite mechanisms were approved.

The *Mensaje* also justified the reform by noting the existing problems in the legislative procedure, which were generating disorganized and flawed legislation. The president was responsible for matters involving public expenditure and public income; however, he usually lost control over these issues by facing a hostile Congress. The 1970 reform gave the president exclusive legislative initiative over these matters and prevented the legislature from modifying legislative bills through logrolling. Legislators lost the power to initiate legislation in these matters, though the Congress' veto power remained.[85] Because legislators could violate the prohibition against initiating legislation in matters that only the President was constitutionally allowed to initiate, and considering that the Supreme Court could not serve as an arbiter, the power to resolve legislative issues was given to the new Constitutional Tribunal.[86] Frei reiterated these reasons in other documents and speeches,[87] and also in an essay of his authorship.[88] Legislators supporting the reform understood that the project benefited the President, and they endorsed it nonetheless.[89] Later, Senators from rival political parties (Francisco Bulnes, PN; Rafael Gumucio, UP) agreed that the 1970 reform was intended to strengthen presidentialism.[90]

Although the 1970 reform did not explicitly say that the jurisdiction of the Constitutional Court was to be limited to legislative procedural issues (thus, theoretically allowing the CT to enforce rights), this was indeed the case. For that reason, only legislators and the president could submit cases to the Tribunal, which possessed only *ex-ante* review powers, a design that makes courts more political in nature.[91] Further, the 1970 reform gave the CT other limited ancillary powers, including the authority to declare the inability of the secretaries of state to continue serving as secretaries of state and the power to solve issues regarding the lack or Presidential promulgation of statutes approved by the Congress.

4.2. Why UP legislators opposed the 19/0 reform?

While 1970 reform supporters endorsed Frei's arguments during the legislative debates, the UP legislators (with the exception of a few of the Radical Party senators) advocated against the creation of a constitutional tribunal. The question then arises why the UP legislators opposed the 1970 reform.

[84] Piedrabuena, *supra* note 54, at 66.

[85] Maira, *supra* note 28, at 259.

[86] Francisco Cumplido, *La Especificación de la Ley*, *in* Reforma Constitucional 1970, *supra* note 53, 179, at 180.

[87] Silva B., *supra* note 52, at 220; Piedrabuena, *supra* note 54, at 141–152.

[88] Eduardo Frei, *La Reforma Constitucional en su Contexto Histórico-Político*, *in* Reforma Constitucional 1970, *supra* note 53, 19.

[89] Historia de la Ley N° 17.284, Modifica la Constitución Política del Estado, *supra* note 85, at 281.

[90] Sesión 11, Senado, Legislatura 313, Ordinaria, 848–851 (1971).

[91] Garoupa, *supra* note 24, at 9.

There are two perspectives for answering this question. The first one is based on the arguments legislators provided during the legislative debates. The second approach connects those arguments with the political motivations they had.

During the legislative debates prior to the establishment of the Constitutional Tribunal, the UP legislators opposed the 1970 reform expressing the following reasons: the Communist Representative Luis Enrique Tejeda claimed that the creation of a constitutional tribunal would not benefit the country, and that legislators would end up resigning part of their power.[92] Representative Orlando Millas (Communist) argued that creating a constitutional tribunal would be an undesirable step liable to hinder transformations Chile sorely needed, and instead advocated creating a more efficient legislative procedure, including the establishment of a unicameral Congress.[93] Senator Carlos Altamirano (Socialist) was worried that the Congress's powers were going to be curtailed by a constitutional tribunal that would represent the interests of the president and the Supreme Court.[94] Senator Luis Fernando Luengo was skeptical about the constitutional tribunal being a sort of "guardian angel of the Constitution," and "bringing the Congress to its knees before the President."[95] Senator Volodia Teitelboim (Communist) said that the constitutional tribunal was a legal "myth" unable to ensure impartiality.[96] After the 1970 reform was published, during the justices' confirmation procedure, Senator Tomás Chadwick (UP) argued that the Constitutional Tribunal was going to be an absurd façade to put an end to political conflicts by a group of people disguised as judges,[97] while Teitelboim added that the non-political character of the CT was impossible.[98]

Regardless of the arguments outlined above, what were the political motivations UP legislators had for opposing the creation of a constitutional tribunal? One possible answer suggests that the PN and PDC legislators created the Tribunal to protect themselves against the possibility of the Allende administration preventing the implementation of a socialist agenda.[99] I would like to offer a different explanation: the Constitutional Tribunal was set up because a majority of legislators, regardless of their political affiliation, believed that Allende was going to lose the election. The UP legislators believed that Alessandri (PN) was going to win, and that a constitutional tribunal would protect his powers against the Congress, the only institution over which the UP was going to have any influence.

We know that the 1970 reform was intended to favor the next president after Frei had come to the end of his term. When the constitution-makers discussed the reform, a new president had not yet been elected, and the parties were vetting their respective candidates. The press and the public opinion did not pay much attention to the reform

92 Sesión 30, Cámara de Diputados, 1969.

93 Historia de la Ley N° 17.284, *supra* note 85, at 47–48.

94 Mac-Clure, *supra* note 59, at 196.

95 Andrade, *supra* note 58, at 604.

96 *Id.* at 604.

97 Sesión 11, Senado, Legislatura 313, Ordinaria, *supra* note 92, at 858.

98 Sesión 13, Senado, Legislatura 313, Ordinaria, 961 (1971).

99 Navia, *supra* note 59, at 19.

debates that took place in 1969, because everyone was distracted by a small, unrelated military insurrection known as *Tacnazno* (October 1969).[100] Then, the attention was focused on the presidential candidates more than on the reform. At the same time, the legislators tied the reform to the predicted presidential election results: if they believed that their preferred candidate was going to win, they would have good reasons to support the reform. If, on the other hand, they thought that their preferred candidate was going to lose, they would not have endorsed the reform.

The election polls were flawed, partly because they focused overwhelmingly on Santiago voters, and they showed Alessandri in the lead.[101] As a result, the PN legislators were "delighted to support" Frei's reform,[102] and the UP legislators rejected it.[103] Many UP politicians did not consider Allende to be the best candidate, and he barely won the UP nomination.[104] His victory was a surprise for many.

After Allende's election and as his appointees to the Constitutional Tribunal were being confirmed, Senator Teitelboim recognized that the Congress had not expected Allende to win the election[105] and that, although the UP legislators had originally voted against creating a constitutional tribunal, they should now support Allende's appointees.[106]

The political predictions explain why the PN and PDC legislators endorsed the CT, but later criticized it when the Tribunal favored Allende. The establishment of the CT had been an opportunistic decision.

To sum up, the UP legislators argued that the Congress risked losing power through the establishment of a biased constitutional tribunal, while at the same time they tried to prevent any future right-wing president from expanding his power by controlling the tribunal.

4.3. The Constitutional Tribunal design

The Constitutional Tribunal design combined the appointment of justices with legal background with appointment renewal rules that held the justices politically accountable to their appointing authorities. The justices were also elected for a renewable four-year term, i.e. shorter than the presidential six-year term. This design permitted the appointing authorities to punish or reward the justices according to how they voted in the Tribunal's decisions. Dissenting opinions were published—something rare in civil-law countries but common in the Chilean tradition—thereby depriving the dissenters of their anonymity.

[100] Sigmund, *supra* note 30, at 87. In the *Tacnazo*, the military insurrection intended to improve labor conditions in the military.

[101] The polls taken by Eduardo Hamuy or CEDOP (Hamuy's poll company) in May 1970, July 1970, and August 1970, consistently showed that Alessandri was in the lead. See a summary of these polls and others in Patricio Navia & Rodrigo Osorio, *Las Encuestas de Opinión Pública en Chile antes de 1973*, 50 Lat. Am. Res. Rev. 117, 124–126 (2015).

[102] Sigmund, *supra* note 30, at 88.

[103] *Id.* at 88; Valenzuela, *supra* note 28, at 37; Mac-Clure, *supra* note 59, at 196.

[104] Tapia, *supra* note 32, at 43.

[105] Sesión 13, Senado, Legislatura 313, Ordinaria, *supra* note 100, at 962.

[106] *Id.* at 963.

The Constitutional Tribunal was composed of five members, and it was not part of the judiciary. The Tribunal's explicit purpose was to apply the Constitution in cases submitted to it. The Tribunal's jurisdiction was restricted to the enumerated powers that the constitutional reform established. Only the president, the House of Representatives, the Senate, or a third of any of the Congress's legislative chambers, were able to submit cases to the CT. The president, with the consent of the Senate, appointed three justices, and the Supreme Court nominated the other two from among its members. The Supreme Court appointees were career judges, whereas the presidential appointees were lawyers with a minimum of twelve years of legal practice.

Despite the fact that the CT was a tool of presidential empowerment, constitutional designers expected the Tribunal to act as a court of law and to operate with impartiality. Some defended this legalistic approach, while others acknowledged the political incentives inherent in its design. Because it combined political and judicial appointees, the CT was considered an "intermediate" (or mixed) institution.[107] Some argued that the CT would have been better designed with a "judicial majority," instead of a "political majority."[108]

The final CT design was influenced by a proposal by Senator Anselmo Sule (a member of the Radical Party), who advocated a middle-ground option: keeping the 3/2 composition with a politically appointed majority, but requiring that one of those justices have an academic background and previously worked for a minimum of ten years as a university professor in administrative or constitutional law. The appointed professor was expected to team up with the Supreme Court appointees, producing a *legal* majority.[109] The first justice that fulfilled this requirement was Silva C., who was a Radical Party member like Senator Sule. The idea that Supreme Court justices might join forces with an academic to form a *legal* majority against a *political* minority, was naïve since, as this article proposes to show, Silva C. and the Supreme Court Justices had rival preferences.

5. The justices

A cursory look at the appointment procedures and the justices' background tells us that the Constitutional Tribunal was divided into two groups: on the one hand, a group of three justices with left-wing affiliation and scholarly credentials (Adolfo Veloso, Enrique Silva C., and Jacobo Schaulsohn); on the other, two career judges with conservative credentials (Ramiro Méndez and Rafael Retamal). One of the last two judges retired early (Méndez) and was replaced by another judge with conservative credentials (Israel Bórquez). Whether these two groups represented a de facto split within the Tribunal, will be examined in Section 6. This section focuses on the individual judges and their appointment trajectories.

[107] Andrade, *supra* note 58, at 588.

[108] Historia de la Ley N° 17.284, *supra* note 86, at 361–362.

[109] Piedrabuena, *supra* note 54, at 115.

5.1. The Supreme Court appointees

The Supreme Court appointed two justices from among its members. They served part-time in both courts. Their internal selection procedure was secret. We know only that each Supreme Court member had one vote.[110] The question arises whether the Supreme Court judges at that time would have been interested in becoming Constitutional Tribunal justices. There are two possible answers.

First, Supreme Court Justices may not have been interested in becoming members of the CT because serving simultaneously in two different courts implied much work and the function of the Constitutional Tribunal could make them involved in politically salient issues that Chilean judges traditionally neglected. For these reasons, Supreme Court justices may have wanted to make their tenures in the CT as short as possible. Ramiro Méndez's appointment is consistent with that view: since he was going to retire from the Supreme Court (hence, automatically retiring from the Constitutional Tribunal) because of the legal age limit (75), he was never going to finish the 4-year term in the Constitutional Tribunal. Moreover, he never authored a CT decision. A second possible answer claims that Supreme Court members were interested in becoming CT Justices to advance their views. Since Rafael Retamal and Israel Bórquez actively opposed Allende, their appointments may fit this answer.

What do we know about Méndez, Retamal, and Bórquez? Méndez and Retamal were considered to be against Allende's government,[111] and to share the political doctrine of the opposition.[112] As a President of the Supreme Court, Méndez accused the left of trying to politicize the Judiciary [113] and promoted a judicial self-restraint philosophy that favored the opposition.[114] Bórquez was considered a "rabidly right-wing" judge.[115] These views are consistent with the scholarly characterization of the Supreme Court of that period, which generally opposed Allende.[116]

5.2. Allende's appointees

To be approved, Allende's appointees required a majority consent of the Senate. Some senators argued that the Senate's consent requirement meant that the appointment procedure was a *shared* appointment. Thus, a president–Senate agreement was necessary for selecting the justices.[117] Senator Francisco Bulnes (PN) argued that this last view was desirable because a bipartisan political agreement on a judicial nomination would result in appointing a truly impartial (and non-partisan) judge.[118] UP Senators rejected Bulnes's approach and claimed that the role of the Senate was limited to

[110] Humberto Nogueira, *Revisión del Modelo Orgánico y de la Legitimidad del Tribunal Constitucional Chileno*, 11 Universum 133, 139 (1996).

[111] Sesión 13, Senado, Legislatura 313, Ordinaria 1971, *supra* note 100, at 961.

[112] Sesión 11, Senado, Legislatura 313, Ordinaria, *supra* note 92, at 853.

[113] Hilbink, *supra* note 28, at 99.

[114] *Id.* at 99.

[115] *Id.* at 89.

[116] Tapia, *supra* note 32, at 75; Valenzuela, *supra* note 28, at 81; Hilbink, *supra* note 28, at 83–88.

[117] Sesión 61, Senado, Legislatura 312, Extraordinaria, 3198 (1971).

[118] Sesión 11, Senado, Legislatura 313, Ordinaria, *supra* note 92, at 848–850.

control the candidates' legal requirements.[119] According to this last view, the Senate was allowed to deny a nomination only when, for instance, the candidate lacked the required law degree.

Allende selected three candidates and sent the list to the Senate: Manuel Sanhueza (a member of a small party supporting the UP), Adolfo Veloso (Socialist) and Silva C. (PR). A Senate committee suggested rejecting the presidential nominations because the president did not consult the senators in advance.[120] The issue was debated but not resolved. Senator Teitelboim recognized that the appointees had political inclinations,[121] and defended their honesty and competence;[122] while Senator Rafael Gumucio (UP) argued that since the 1970 reform favored the president, it made no sense to appoint justices that will not favor Allende.[123] In the end, the Senate confirmed Veloso's and Silva C.'s appointments, while rejecting Manuel Sanhueza's nomination (see Table 1). Allende appointed Sanhueza as secretary of justice.

As a replacement for Sanhueza, Allende offered a more moderated candidate: Jacobo Schaulsohn (PR), who was a center-left scholar and politician.

Considering the backgrounds of the justices appointed by Allende, politicians on the opposition were skeptical about those justices' political inclinations, even though some non-UP senators valued the justices' academic credentials.[124] The fact that two out of the three Allende appointees belonged to the Radical Party (the most moderate of the UP parties) may suggest that Allende tried to show a moderate approach. This may explain why some non-UP senators voted for confirming the appointments made by Allende.

5.3. A left-wing Constitutional Tribunal with a self-perceived formalist judicial role

Edgardo Boeninger, a PDC politician and a scholar claimed that Allende had a 3/2 majority in the Constitutional Tribunal.[125] Although this view seems too simplistic, it seems the justices' background (see Table 2).

Table 1. Senators Votes on Allende's Appointees.

Candidate	Approves	Rejects	Other
Sanhueza	15	18	0
Silva C.	21	9	3
Veloso	19	11	3

Source: Sesión 13, Senado, Legislatura 313, Ordinaria, 961, at 964 (1971).

[119] *Id.* at 856–857; Sesión 13, Senado, Legislatura 313, Ordinaria, *supra* note 100, at 963.
[120] Sesión 61, Senado, Legislatura 312, Extraordinaria, *supra* note 120, at 3197–3200.
[121] Sesión 13, Senado, Legislatura 313, Ordinaria, *supra* note 100, at 961.
[122] *Id.* at 963.
[123] *Id.*
[124] Sesión 11, Senado, Legislatura 313, Ordinaria, *supra* note 92, at 848–873.
[125] Boeninger, *supra* note 61, at 201.

Table 2. Justices' background.

Name	Appointing Authority	Background	After serving in the CT
Silva C.	Allende	Radical Party politician, scholar	Secretary of State and Senator in the 90's.
Schaulsohn	Allende	Radical Party politician, scholar	Scholar. Inter-American Bar Association member. Tel Aviv University Board member
Veloso	Allende	Socialist politician, scholar	Exiled during the dictatorship. *Intendente* appointed by President Aylwin.
Méndez	Supreme Court	Judicial career	Retired.
Retamal	Supreme Court	Judicial career	Supreme Court judge and Supreme Court President.
Bórquez	Supreme Court	Judicial career	Supreme Court judge. Appointed again as a CT Justice during the dictatorship (1981–1985).

Source: Congress biographies, *available at* http://www.bcn.cl/laborparlamentaria; historical documents; and complementary bibliography.

During the first session of the CT, the justices elected the Tribunal president. The presidency term was two years and renewable. Schaulsohn proposed Silva C. as a candidate (a suggestion supported by Veloso), while Retamal suggested Méndez.[126] After failed attempts at unanimity, they all agreed to elect Silva C. as CT president. The justices renewed Silva C.'s term in 1973,[127] showing that, even though they were divided, they had at least a minimal willingness to work together.

The justices also shared a self-imposed commitment to the Chilean formalist judicial tradition, as shown by the rules they enacted to organize their work.[128] These rules reflected the justices' perception of the Constitutional Tribunal as a real court of law that was supposed to look and to work within the Chilean judicial tradition. The justices were addressed as *Excelencia* ("your excellence"), a form of address that Chilean law reserves for Supreme Court justices. In adjudicating cases, the justices were only allowed to publicly express their opinions through the written judicial opinions. CT judges were not authorized to participate in political events, and the rules continuously referenced ordinary judges' regulations. The Tribunal maintained this approach in the rules the CT enacted later to regulate the judicial procedures.[129] The regulation involved formal

[126] Actas del Tribunal Constitucional 1971–1973, at 1.

[127] *Id.* at 58.

[128] These rules were enacted by the Constitutional Tribunal: AutoAcordado: Estatuto Jurídico Sobre Organización y Funcionamiento del Tribunal Constitucional, Nov. 23, 1971, Diario Oficial [D.O.] (Chile).

[129] AutoAcordado: Estatuto Jurídico Sobre Procedimiento, Dec. 11, 1971, Diario Oficial [D.O.] (Chile).

rules about standing, notifications, defense, and deadlines, and it was notoriously influenced by the procedures established for Appeals Courts and the Supreme Court.

6. The Constitutional Tribunal in action

The Tribunal dealt with seventeen cases, all of which resulting from conflicts between Allende and the opposition. Given the limited CT jurisdiction, seventeen does not seem like an insubstantial number. It appears representative of an era characterized by inter-branch conflicts.[130] All the cases were *first-iMpression* cases (i.e., cases that lack prior controlling precedents); most of the pertinent constitutional rules had never been applied by judges before; and some of those rules were not precise enough to make the CT decisions predictable.[131] Consequently, most cases lent themselves to rival interpretations.

Allende submitted nine cases and the opposition submitted eight cases to the CT. Two cases were merged and decided together,[132] while three other cases were settled before the CT could render decisions.[133] Thus, there are only thirteen judicial decisions that are useful for this paper. Four cases addressed more than one issue,[134] forcing the justices to vote more than once. Since this article focuses on the justices' voting behavior, rather than studying the cases themselves, it will examine the issues at dispute (see Table 3).[135]

The majority of the votes favored Allende, which is not surprising,[136] but the number of votes favoring Congress was not substantially smaller. However, any statistical approach to the CT will be limited by the fact that the cases were not equally important, as well as by the low number of available issues to examine.

The CT resolved almost half of the issues with at least one dissenting opinion. For a country used to having a deferential judicial culture, that number seems high and suggests that the CT was highly divided.

Table 3. Issues of the CT.

Total issues	Unanimous votes	Outcomes favoring Allende	Outcomes favoring opposition
21	10	12	9

Source: Data from CT decisions.

[130] Silva C., *supra* note 56, at 56.

[131] *Id.* at 156–157.

[132] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 6 junio 1973, Rol: 16–17.

[133] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 22 noviembre 1972, Rol: 10; Tribunal Constitucional [T.C.] [Constitutional Tribunal], 22 noviembre 1972, Rol: 11; Tribunal Constitucional [T.C.] [Constitutional Tribunal], 9 abril, 1973, Rol: 14.

[134] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 1 febrero 1972, Rol: 4; Tribunal Constitucional [T.C.] [Constitutional Tribunal], 16 enero 1973, Rol: 12; Tribunal Constitucional [T.C.] [Constitutional Tribunal], 9 abril, 1973, Rol: 14; Tribunal Constitucional [T.C.] [Constitutional Tribunal], 6 junio 1973, Rol: 16–17.

[135] I do not consider the merely procedural issues, such as the case when the CT decided whether a written document satisfied a given formal requirement. Since most of those issues are based on unreliable reasons (the *just-in-case* fallacy), and they do not reflect party divisions, I focus only on the substantial issues.

[136] Silva C., *supra* note 56, at 159–160.

Table 4 shows how the justices voted individually. Except Méndez (who retired early), all justices voted in at least 15 (out of 21) issues.[137]

The differences among the justices are significant. Veloso (who favored Allende 76.19% of the time) and Silva C. (70%) seem to have teamed up against Retamal (30%) and Bórquez (33.33%). If we do not consider Méndez (who only voted six issues), the justices appointed by the Supreme Court consistently voted against Allende. Veloso and Silva supported Allende's preferences more than 70 percent of the time, while Schaulsohn showed a moderate 47.61 percent. Schaulsohn's voting behavior fits his appointment story. Since he was appointed after the Senate had rejected Sanhueza's candidacy, we could expect Schaulson to be a less partisan justice.

6.1. The cases

Some cases were brought by Allende to protect his legislative powers pertaining to public expenses and taxes. The 1970 reform gave the president exclusive initiative on those issues, leaving the Congress only veto power over those bills. The purpose of the rule establishing an exclusive presidential initiative in these matters was to organize public finances better, to make the legislative process more orderly,[138] and to improve the quality of the legislative debates.[139] Recent research shows that the CT favored Allende.[140] This conclusion is consistent with the CT's decisions: the Tribunal prevented the Congress from adding provisions to Allende's General Budget Act;[141] stopped the Congress from modifying a presidential veto which added provisions to a tax legislative bill;[142] and prohibited the Senate to extend the benefits of a presidential bill to additional beneficiaries.[143]

Mixed rulings were given in other cases: the Tribunal allowed the Congress to partly expand the budget and include a non-discriminatory clause, but prevented it from redistributing funding.[144] In another case, the CT declared two of five provisions challenged by Allende unconstitutional.[145]

On the issue of Allende refusing to promulgate statutes approved by the Congress, the CT ruled twice in Allende's favor,[146] and dismissed two other cases because Allende had promulgated the statutes in the meantime.[147]

[137] I only focus on judicial *votes* that decide the corresponding issues. I do not consider concurring opinions separately.

[138] Frei, *supra* note 90; Cumplido, *supra* note 88; Silva C., *supra* note 56, at 64–65.

[139] Axel Buchheister & Sebastián Soto, *Ideas Matrices en los Proyectos de Ley: Inconsistencias del Tribunal Constitucional*, *in* Sentencias Destacadas 2014, at 125, 127 (2005).

[140] Fermandois & García, *supra* note 60.

[141] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 19 enero 1972, Rol: 1.

[142] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 17 mayo 1972, Rol: 6.

[143] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 12 septiembre 1972, Rol: 7.

[144] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 16 enero 1973, Rol: 12.

[145] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 9 abril, 1973, Rol: 14.

[146] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 1 febrero 1972, Rol: 4; Tribunal Constitucional [T.C.] [Constitutional Tribunal], 14 septiembre 1972, Rol: 8.

[147] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 22 noviembre 1972, Rol: 10; Tribunal Constitucional [T.C.] [Constitutional Tribunal], 22 noviembre 1972, Rol: 11.

Table 4. The justices' voting behavior.

Justice	Political affiliation	Appointed by	Total of votes	For Allende	Against Allende	% supporting Allende
Méndez	Non-partisan conservative	Supreme Court	6	5	1	83.33
Veloso	Socialist Party, UP	Allende	21	16	5	76.19
Silva C.	Radical Party, UP	Allende	20	14	6	70
Schaulsohn	Radical Party, UP	Allende	21	10	11	47.61
Bórquez	Non-partisan conservative	Supreme Court	15	5	10	33.33
Retamal	Non-partisan conservative	Supreme Court	20	6	14	30

Source: Data from CT decisions.

In another legislative dispute, the CT rejected a Congress override of a Presidential veto on the ground that the Congress was required to achieve a higher quorum.[148] Later, the CT denied Allende's rejection of a provision introduced by legislators supposedly violating procedural rules;[149] and ruled that an Allende legislative decree violates a legislative deadline.[150]

6.2. Tohá's impeachment and the *Áreas de la economía* case

There were two particularly politically salient cases. In both cases, the Constitutional Tribunal was called to protect Allende's powers against the opposing legislators' tactics trying to destabilize his government.

One of these tactics, criticized by UP advocates,[151] consisted in impeaching executive branch officers.[152] Under the 1925 Constitution, the House initiated impeachments, and the Senate decided them. Once an impeachment was initiated, the accused officer was suspended from his job pending the Senate's decision. If impeached, the officer lost his or her job. The opposition never had the required supermajority to impeach Allende, and instead targeted his main collaborators,[153] especially his secretaries of state.[154]

Since Allende could not stop the Congress from impeaching his collaborators, he developed a strategy to maintain his cabinet: when a secretary of state faced impeachment, Allende transferred him or her to another position before the Senate could make a decision, and claimed that the impeachment would not affect the person's new job.

The opposition impeached José Tohá (Allende's secretary of interior and his most powerful collaborator) in what was considered to be a political judgment against the entire Allende administration.[155] Before the Senate's decision was released, Allende transferred Tohá and appointed him as a secretary of defense. The Congress argued that Tohá was unable to become a minister of defense, because of the impeachment. Allende responded that the impeachment had no effects against Tohá's new job. Legislators submitted the case to the CT. It was a first-impression case without clear rules to orient the outcome.

The CT ruled in favor of Allende in a 4/1 voting,[156] legitimizing Allende's strategy to avoid cabinet instability.[157] The only dissenting justice was Retamal.

The second case that involved an opposition challenge to destabilize Allende's administration was informally called the "*Áreas de la EconoMía"* case (hereinafter,

[148] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 25 enero 1972, Rol: 2.
[149] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 26 octubre 1972, Rol: 9.
[150] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 5 abril 1972, Rol: 5.
[151] Novoa, *supra* note 39, at 6.
[152] Maira, *supra* note 28, at 258–274.
[153] Tapia, *supra* note 32, at 69–70.
[154] Corvalán, *supra* note 31, at 193–194.
[155] Julio Lavín, *El Papel del Congreso Nacional en el Gobierno de la Unidad Popular*, 10 Rev. Derecho Valparaíso 305, 311 (1986).
[156] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 10 febrero 1972, Rol: 3.
[157] Maira, *supra* note 28, at 266.

"*Áreas*"). The name of the case refers to the *Áreas* constitutional reform proposal, which intended to regulate the state intervention in specific economic sectors. The *Áreas* case was originated during the legislative procedure of the *Áreas* reform proposal. The proposal, put forward by two PDC Senators (Juan Hamilton and Renán Fuentealba), was part of a "counter-revolutionary" tactic being developed by the opposition in order to undermine Allende's agenda.[158] The purpose of this tactic was to restrict Allende's power to intervene in the economy.[159] The *Áreas* reform proposal required strict conditions for intervening in each of the economic sectors, and was viewed by UP supporters as a capitalist monopoly strategy,[160] producing a substantial discrepancy between Allende and the opposition.[161]

The Congress approved the *Áreas* reform proposal, and Allende vetoed its most relevant parts. The Congress overrode Allende's veto by a simple majority, and Allende objected that a simple majority was not enough to override his veto. Since the Constitution did not specify a quorum requirement for overriding the presidential veto in a case of constitutional reform, and the constitution-amenders behind the 1970 reform never discussed this issue,[162] the case was open to rival interpretations. Allende argued that a two-thirds majority was required because that was the rule for overriding a veto for normal legislation. The opposition responded that a simple majority requirement was the default rule, and several scholars supported that argument.[163]

Legislators challenged Allende to call a plebiscite in order to resolve the issue, but Allende preferred to first submit the case to the Constitutional Tribunal, pos- sibly because he was afraid of losing the plebiscite.[164] The opposition argued that the Tribunal lacked jurisdiction over the case on the ground that the Tribunal did not have the power to create constitutional provisions.[165] Also, the opposition threatened the CT, warning that if it ruled in favor of Allende, they would not obey the decision.[166]

[158] *Id.* at 258–274.

[159] Silva C., *supra* note 56, at 114–125.

[160] Lavín, *supra* note 159, at 315.

[161] Silva C., *supra* note 56, at 132.

[162] Sigmund, *supra* note 30, at 168

[163] One of the most influential legal journals of that time published several papers supporting the opposition arguments. *See, e.g.*, Carlos Cruz-Coke, *Debate sobre despacho de la Reforma Constitucional,* 13 Revista de Derecho Público 187 (1972); Guillermo Bruna, *Vetos a la Reforma Constitucional: Plebiscito y no Tribunal Constitucional*, 13 Revista de Derecho Público 197 (1972); Guillermo Gandarillas, *El Plebiscito en la Carta de 1925 y en la Reforma de 1970*, 13 Revista de Derecho Público 203 (1972); Jorge Ovalle, *Un Proyecto de Reforma Constitucional no es un Proyecto de Ley Ordinaria,* 13 Revista de Derecho Público 206 (1972); Jaime Navarrete, *Observaciones del Presidente de la República y Reforma Constitucional*, 13 Revista de Derecho Público 209 (1972); Luz Bulnes, *Estudio sobre la Procedencia de los Vetos Formulados por el Presidente de la República al Congreso Pleno que Reforma los artículos 10 no. 10 y 44 de la Constitución Política del Estado,* 13 Revista de Derecho Público 223 (1972). Only one article defended Allende's position: Francisco Cumplido, *El Veto del Presidente de la República en el Proyecto de la Reforma Constitucional,* 13 Revista de Derecho Público 241 (1972). The journal also included a letter by Gustavo Lagos (PDC), one of the key-politicians of the 1970 reform, which defended the opposition's arguments. *See* Gustavo Lagos, *Carta Sobre Alcances de la Reforma Constitucional de 23 de enero de 1970*, 13 Revista de Derecho Público 216 (1972).

[164] Arturo Valenzuela, *Political Constraints to the Establishment of Socialism in Chile*, *in* Chile: Politics and Society 1, 2 (Arturo Valenzuela & J. Samuel Valenzuela, eds., 1976).

[165] Evans, *supra* note 71, at 78–79.

[166] Silva C., *supra* note 56, at 141.

Although the CT explicitly rejected the warning, it decided that it lacked the jurisdiction to solve the case by a four-to-one majority.[167] The only dissenting justice was Veloso.

Is it correct, then, to say that Congress won the case? As a matter of law, the CT did not decide the case—it did not establish a legislative majority requirement for overriding the presidential veto. Politically, the Constitutional Tribunal favored the opposition.[168] Allende's administration were frustrated, since they had been confident of their majority in the CT.[169]

By the time the CT had delivered its decision, the deadline by which Allende was supposed to promulgate the bill that contained the *Áreas* reform proposal, had passed. The opposition asked the CT to force Allende to promulgate the reform—in Chile, only the President can promulgate a constitutional reform—and Allende argued that he was not obliged to promulgate what he considered the unconstitutional part of *Áreas*. The CT ruled that while Allende was allowed not to promulgate the *Áreas* bill while the issue was been considering by the CT, the *Áreas* bill was not unconstitutional.[170]

The *Áreas* issue turned into a "byzantine dispute."[171] At first, Allende's government delayed the promulgation, "creating the impression, albeit false, that it [the government] was preparing the ground for a dramatic political gesture."[172] Then, Allende promulgated only those parts of the bill that had not been subject to his own veto. The opposition considered Allende's strategy to promulgate only part of the reform as "one of the biggest attacks against the Constitution."[173] The Constitution was "trivialized" and "the government lost control over political events."[174]

The *Contraloría* rejected Allende's promulgation because it was incomplete, and the opposition declared that the rule of law was broken.[175] There was no institution capable of arbitrating the conflict.[176] As a response, the Congress impeached four secretaries of state and eight other senior officers and a party called "*DeMocracia Radical"* declared that an "effective fight on all fronts must begin," a declaration that was followed by a right-wing newspaper that explicitly called for a military intervention.[177] Thus, the conflict "moved into the streets."[178] A first attempted coup d'état, famously called *Tanquetazo,* occurred in June 1973, and the September 11, 1973 coup overthrew Allende.

Silva C. argued that the CT had been unable to resolve the political conflict, which had exceeded the realm of the law.[179] Silva B. said that this controversy was one of the

[167] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 30 mayo 1973, Rol: 15.

[168] Sigmund, supra note 30, at 207

[169] Sigmund, *supra* note 30, at 168; Boeninger, *supra* note 61, at 201.

[170] Tribunal Constitucional [T.C.] [Constitutional Tribunal], 6 junio 1973, Rol: 16–17.

[171] Faúndez, *supra* note 40, at 188.

[172] Faúndez, *supra* note 61, at 244.

[173] Lavín, *supra* note 159, at 323.

[174] Faúndez, *supra* note 40, at 189.

[175] Maira, *supra* note 28, at 271; Valenzuela, *supra* note 28, at 93.

[176] Valenzuela, *supra* note 28, at 93; Diana Rivas, 51 Naturaleza Jurídica de la Inaplicabilidad en el Modelo Chileno 28 (2013).

[177] Valenzuela, *supra* note 28, at 93.

[178] Sigmund, *supra* note 30, at 169.

[179] Silva C., *supra* note 56, at 161.

reasons for the 1973 crisis.[180] Because of this case, some contemporary scholars claim that the CT failed,[181] even though some recognize that the CT was powerless to calm down the conflict.[182]

/. Did the Constitutional Tribunal satisfy its institutional goals?

Before the *Áreas* case, the performance of the Constitutional Tribunal fulfilled its expected function of protecting the president's powers.[183] Two of the justices appointed by the president voted in his favor, while the one whose appointment was influenced by the Senate showed a mixed voting record. The justices appointed by the Supreme Court were expected to reflect the Supreme Court's deferential and conservative attitudes, which were supposed to favor the candidate who was expected to win the presidential elections, i.e. Alessandri. Two of the three Supreme Court appointees voted consistently against Allende.

On the whole, the Constitutional Tribunal did not do *More* than it aimed, but it did *less*. The CT did not do *More* because it did not exceed its constitutional goals. One of the most common ways in which courts grow powerful is by developing a rights-based jurisprudence. The CT's aim was not rights-based,[184] it did not receive any rights-based cases, nor did it turn its issues into questions about rights.

The CT did *less* because of its decision in the *Áreas* case. Indeed, the CT decided not to decide. None of the previous cases seemed as important as the challenge the CT faced in this case alone. By refusing to render a concrete decision, the CT left the political conflict up for grabs. Rather than moderate the conflict, the CT stimulated rival politicians unwilling to settle, to keep the conflict ongoing.

Scholars suggest that blaming the CT for not preventing the military coup is unfair.[185] Despite the fact that we will never know what could have happened if the CT would have solved the *Áreas* case, it is reasonable to believe that the growing conflict between the President and the opposition was unlikely to be solved peacefully. Both sides showed themselves to be willing to use non-legal means. Those means included military intimidation, letting violent groups take over the streets, calling people to "fight on all fronts," and threatening the CT with refusing to accept an unfavorable decision. Consequently, the CT's failure had to do with the political context, and

[180] 9 Alejandro Silva B., Tratado de Derecho Constitucional 13 (2003).

[181] Ríos, *supra* note 63, at 630; Couso, *supra* note 59, at 1529; Amaya Alvez, *Forcing Consensus: Challenges for Rights-Based Constitutionalism in Chile*, *in* Rights in Divided Societies 245, 251 (Colin Harvey & Colin Schwartz eds., 2012).

[182] Ribera, *supra* note 51, at 87.

[183] I am agnostic regarding the issue whether the CT achieved a significant jurisprudence from a legal perspective, an issue that divides scholars. Some believe that the CT did not really achieve a relevant jurisprudence: *see, e.g.*, Navarro, *supra* note 68, at 29, while others claim that its jurisprudence had valuable contributions Silva C., *supra* note 56; Silva B., *supra* note 163, at 12–13.

[184] Cea, *supra* note 63, at 112; Couso, *supra* note 59, at 1529; Mac-Clure, *supra* note 59, at 198.

[185] Silva C., *supra* note 56, at 161; Ribera, *supra* note 51, at 87; Navia, *supra* note 59, at 18.

possibly also with an institutional design that made the CT Justices accountable to the appointing authorities. The CT did not so much jump off the cliff, but was *pushed.*

Even though we could imagine a situation in which the coup might have been prevented, the Tribunal was not an institution capable of doing so. The opposition's disobedience and Allende's refusal to call for a plebiscite and promulgate the bill, clearly showed that neither side was prepared to accept losing the *Áreas* case. It is conceivable that the CT justices (all experienced politicians, scholars, or judges) knew that. If that is true, the *Áreas* non-decision can be explained as an attempt of four of the five judges to keep the Tribunal away from a conflict in which its effectiveness was at risk. Perhaps that is why Schaulsohn (the most moderate judge) wrote the decision and why Veloso (the judge most committed with Allende) was alone in his dissent.

Another interesting question is whether the CT functioned politically or not, especially if we consider that, in theory, the CT was supposed to apply the "law" (whatever it might have been). Some scholars have argued that the 1970 Constitutional Tribunal was a united court that applied the law,[186] while others claimed that the CT was politically motivated.[187] Friedler blames the appointment system of the CT and the "mind-set of its members" for what she calls the CT's failure.[188] A mixed answer seems more appropriate. We know that the CT was politically divided, but we also know that it decided half of the cases unanimously. The cases decided unanimously were probably easy cases, while the divided cases were probably harder cases. Although a scholar suggests that observing dissent is not enough for demonstrating the influence of ideology,[189] the CT voting record suggests that party alignment existed: each side (the president versus the Congress) had two justices acting as agents, and that Schaulsohn operated as a swing Justice.

In any case, the question about the polarization of the CT does not help us to understand whether the CT fulfilled its aim or not. Although usually justices are expected to function impartially and to apply the law, the role of moderating inter-branch disputes does not exclude the possibility of the justices using their political preferences. As explained before, the CT's design combined legal backgrounds with political incentives. The results are consistent with that design.

8. Concluding remarks

The story of the Chilean Constitutional Tribunal does not completely fit any theory of judicial review outlined above. Rights were not relevant to the CT; nor was the existence of a past authoritarian regime. The academic elite was influential at the beginning, but its intervention does not explain the political decision to establish the CT. Political competition existed during and after the creation of the CT, but the Tribunal

[186] Silva C., *supra* note 56; 2 Humberto Nogueira & Francisco Cumplido, Instituciones Políticas y Teoría Constitucional 210 (2001).

[187] Guzmán, *supra* note 51, at 68.

[188] Friedler, *supra* note 65, at 321.

[189] Garoupa, *supra* note 24, at 11.

was not created by an agreement among the relevant competing political coalitions, but by a legislative majority that imposed President Frei's reform against a significant minority. The insurance theory is not applicable since the CT was not insurance for political losers, but a protection for the next President.

A theory that seems to fit the CT's story is the separation of powers theory. The way political coalitions organized during the CT time permanently confronted the President with the Congress. Rival factions controlled different branches of government. Without the inter-branch conflict, the CT would not have been created, nor would it have acquired any political relevance. However, when powerful parties threatened not to accept an unfavorable verdict, the influence of the Tribunal was undermined. Thus, the separation of powers can help explain the inter-branch conflict that the CT was supposed to arbiter, but it does not help explain the CT's decay.

What can judicial review literature learn from the Chilean Tribunal's experience? Besides confirming that none of the judicial review theories is universal, the CT's experiences suggest two lessons. The first lesson is that the theories that claim that judicial review appears or strengthens when conflicts of political power arise (either inter-branch conflict, electoral competition, or power fragmentation), can only take place when the level of such political conflict is not aggravated enough to threaten the constitutional structure as a whole. This first lesson is particularly important in the context of unstable political regimes. The second lesson is that the creation of constitutional courts is not a sufficient remedy to alleviate such conflicts.